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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 435

JOHN F. MULCAHEY, District Director, I. N. S.,
Detroit District,

Petitioner

v.

GUISEPPE CATALANOTTE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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The issue before this Court is the correctness in law of the interpretation by the Court of Appeals of Section 405(a), the savings clause, of the Immigration and Nationality Act of 1952. R. 21.

The whole matter is summed up in the penultimate paragraph of the opinion R-24-25, wherein the Court of Appeals says: "We conclude that Catalanotte's status of non-deportability is protected by Section 405 of the Act, since statutory provisions upon which the government relies do not constitute such specific exceptions to Section 405 as are contemplated in that Section in order to make it inapplicable."

If the Court of Appeals is correct in this, the issue is resolved. If the Court is incorrect, then many questions come to mind which seemingly require consideration.

The petitioner attacks the Court of Appeals decision by saying two things. First, the statute it relies upon is sufficiently specific to constitute such "specific exception" to Section 405 as is contemplated in that Section; Secondly, the status of non-deportability found is not a status within the meaning of the savings clause.

Against the first point made by petitioner are the opinions of this Court in *U. S. v. Menasche*, 348 U. S. 528 and *Shomberg* v. *United States*, 348 U.S. 540, expressly followed by the Court of Appeals R. 24. A footnote to the Shomberg case notices the kind of question raised here. *Shomberg* v. *U. S. supra* at page 543.

This Court, analyzing the statute in the Shomberg case, found several instances in which Congress used the phrase, "notwithstanding the provisions of Section 405", thus clearly manifesting the intention to negative the operation of Section 405. Having used such specific language, Congress clearly indicated the kind of specific provision which was intended to and does negative Section 405. If such specific language is not used in any instance, it can only be concluded that Congress intended a different result from that so specifically expressed. The different result here is that Section 405 operates to protect a status (or other kind of situation named in the statute) existing on the effective date of the Act. This Court stated *U. S.* v. *Menasche, supra* at p. 534) "We conclude dthat Congress intended to adopt the principle of the Bertoldi case that "the new act should take effect prospectively". This would apply to deportation as well as naturalization except where specifically stated that Section 405 would not operate.

II.

The Respondent's view of Petitioner's second point is that there is a mistake in Petitioner's major premise. He argues that "mere inaction of Congress" does not create a status. But we are not dealing with a case of mere inaction of Congress.

Respondent's position in the Court of Appeals was that a status of non-deportability of Catalanotee could be made out on several grounds. It does not depend upon mere inaction of Congress but is related to Congressional policies expressed, and such statutes as that of February 18, 1931, 46 Stat. 1171, which expressly provided prospective effect for deportation for narcotic conviction, and in the statutory provision for recommending against deportation by a Court.

Appellant's brief went to some length in the Court of Appeals to point out that deportation within a limited time was provided for in the penalty section of the Narcotics Law, the criminal statute, along with a fine and imprisonment. This fact seemed to support the argument that adding deportation to Catalanotte's punishment in 1952 or lafer, for an offense for which he was convicted and sentenced in 1925 would be a violation of due process of law guaranteed in the Constitution.

If the respondent is protected by the savings clause against retroactive deportation, there is no occasion for the due process of law argument. But if he is not so protected by the statute, he says the due process clause would protect him. The Board of Immigration Appeals, on the other hand, chose to cite ex post facto decisions, and claimed clearance for its action. The respondent took issue to this secondary argument.

The Court of Appeals did not go into the question of how Catalanotte's status of non-deportability was acquired.

The Court said, R. 22, "The record disclosed that appellant, prior to the Act of 1952, had the status of a non-deportable alien." It quotes the finding of the Board of Immigration Appeals to the same effect.

This is not equivalent to saying that the non-deportable status referred to was created by the "mere inaction of Congress", and in the light of this record, the latter would be untenable.

Throughout Catalanotte's defense he has maintained that he is protected by the provision of Section 405, from deportation on the sole ground of conviction in 1925. His early efforts at defense antedated the earliest decisions interpreting section 405. Respondent conceived the strong ground of his argument to be that the alternative to holding Section 405 to be applicable to his case is that section 241(a) would otherwise be unconstitutional, as applied to him. He pointed to the due process clause, since the government had the election at the time of his conviction to proceed under a statute that would have made him deportable for a narcotic conviction in 1925. But since they did not so proceed on the statute to attempt to declare him deportable within the time which that statute provided, there appears to be no differene in principle now than there would be if the government had elected to waive part of the imprisonment or fine, and after 30 years or more had then decided to try to enforce either of them.

Respectfully submitted,

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Attorney for Respondent.